9-11, 2000 (25)

No. 99-1426

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENTS CITIZENS FOR BALANCED TRANSPORTATION, RICHARD ROMERO (on behalf of himself and his minor son, Richard Romero, Jr.), DAVID MATUSOW, BRIAN McCARTHY, JAMES BASSAGE and MICHAEL GREGORY

ROBERT E. YUHNKE*
2910-B County Road 67
Boulder, CO 80303
(303) 499-0425

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Rd., Suite 153
Phoenix, AZ 85004-4533
(602) 258-8850

Counsel for Respondents Citizens for Balanced Transportation, Richard Romero (on behalf of himself and his minor son, Richard Romero, Jr.), David Matusow, Brian McCarthy, James Bassage and Michael Gregory

**Counsel of Record*

BEST AVAILABLE COPY

51pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATUTORY ANALYSIS INDICATES CONGRESS DID NOT AUTHORIZE EPA TO CONSIDER COSTS AS A RELEVANT FACTOR IN SETTING NAAQS 6

A. The 1970 Amendments 8

1. 1970 Act Repealed Control Techniques As a Relevant Factor 8

2. Pre-1970 Criteria Show Congress Did Not Intend Costs to be Relevant 10

3. 1970 Act Repealed Requirement to Revise Control Technique Information When NAAQS Are Revised 11

B. "Public Health" Was Uniformly Understood as Impairment of "Human Health" by the Diseases of Air Pollution; Not Costs 14

1. "Public Health" As Congress Used the Term 16

2. "Public Health" As the Agency Applied the Term 20

3. The Law's Understanding of "Public Health" 22

C. Legislative History Reveals No Expectation That Costs Are a Relevant Factor 26

TABLE OF CONTENTS – Continued

Page

D. The 1977 Amendments 29

1. The New Duty to Review and, As Appropriate, Revise the NAAQS 30

2. New Requirement for Economic Impact Analysis of Standards 32

E. 1990 Amendments 33

F. Structure of the Act Indicates Congress Intended Costs be Considered When Imposing Control Obligations on Sources, But Not in Setting NAAQS 34

II. PROTECTING AGAINST NON-THRESHOLD POLLUTANTS DOES NOT SUPPLY AUTHORITY TO CONSIDER COSTS 37

III. WHO WINS, WHO LOSES? 41

CONCLUSION 45

TABLE OF AUTHORITIES

Page

CASES:

American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 43

Goldblatt v. Town of Hempstead, 369 US 590 (1962) 23

Industrial Union Dept. v. American Petroleum Inst., 448 US 607 (1980) 1, 5

Lawton v. Steele, 152 US 133 (1894) 23

Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) 4, 45

Mugler v. Kansas, 123 US 623 (1887) 23

Save Our Summers v. Washington State Department of Ecology, No. CS-99-0269-RHW (E.D. Wa.) 44

STATUTES:

Air Quality Act of 1967 – (reprinted in S. Rep. No. 91-1196)

§ 107 ..... 8, 20

§ 108 ..... 8, 9

Clean Air Act, as amended –

§ 107(d), 42 U.S.C. § 7407(d) 34

§ 108(a), 42 U.S.C. § 7408(a) ... 12, 14, 22, 28, 29, 30, 40

§ 108(b), 42 U.S.C. § 7408(b) 8, 12, 26

§ 108(c), 42 U.S.C. § 7408(c) 12

§ 109(a), 42 U.S.C. § 7409(a) 11

TABLE OF AUTHORITIES – Continued

Page

§ 109(b), 42 U.S.C. § 7409(b) ..... passim

§ 109(d), 42 U.S.C. § 7409(d) 29, 30, 31, 32, 33

§ 110, 42 U.S.C. § 7410 ..... 13, 31, 34, 36

§ 111, 42 U.S.C. § 7411 32

§ 113(e), 42 U.S.C. § 7413(e) (1981, repealed 1990) 36

§ 119, 42 U.S.C. § 7419 35

§ 125, 42 U.S.C. § 7425 35

§ 165, 42 U.S.C. § 7475 ..... 34, 42

§ 172, 42 U.S.C. § 7502 ..... 34, 35

§ 173, 42 U.S.C. § 7503 34

§ 202, 42 U.S.C. § 7521 ..... 32, 34, 36

§ 211, 42 U.S.C. § 7545 ..... 34, 35

§ 307, 42 U.S.C. § 7607 41

§ 312, 42 U.S.C. § 7612 33

§ 317, 42 U.S.C. § 7617 ..... 32, 33

Legislative History –

H. Rep. No. 95-294 (1977) 31, 32

S. Rep. No. 91-1196 (1970) 13, 25, 27, 28, 40

S. Rep. No. 101-228 (1989) 41

TABLE OF AUTHORITIES – Continued

Page

Legislative History of the Clean Air Act Amendments of 1970 (January 1974),

Vol. 1 ..... 2, 13, 15, 16, 17, 24, 25, 26, 27, 28, 36

Vol. 2 ..... 9, 28, 38

Miscellaneous –

Air Quality Criteria for Particulate Matter (January 1969) 20

Air Quality Criteria for Sulfur Oxides (January 1969) 20, 40

Breyer, *Breaking the Vicious Circle* 25

Restatement (2d) of Torts, § 821B 22, 23

Restatement (2d), Tentative Draft No. 16 (American Law Institute, 1970) 23

1 Wood, Nuisances (3d Ed. 1893) 23

INTRODUCTION

ATA challenges the D.C. Circuit's 20-year-old affirmation of the EPA Administrator's long-standing construction of Clean Air Act § 109(b) that Congress chose not to allow costs as a factor relevant to setting national ambient air quality standards. The "trilemma" of possible interpretative options posed by American Trucking is based on a false trichotomy. ATA Br. 25. The more appropriate, and more fundamental question underlying a correct construction of the Act is whether Congress intended to 1) delegate to an unelected administrator the responsibility and authority for making the tradeoffs between protecting human health from the adverse effects of air pollution and the costs of protecting health, or 2) retain for itself the authority to make such tradeoffs?

Chief Justice Rehnquist wrote in the Benzene case that "one of the most difficult issues that could confront a decisionmaker [is] whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths," and "that Congress [is] the governmental body best suited and most obligated to make the choice. . . . " *Industrial Union Dept. v. American Petroleum Inst.*, 448 US 607, 672 (1980). Here, respondents Citizens for Balanced Transportation and the individuals who brought their challenge to EPA's failure to set an adequately protective standard for fine particles in order to protect their ability to breathe and lead healthy productive lives, contend that Congress clearly chose not to empower the EPA Administrator to make such life and death tradeoffs. Instead, all the reliable indicators of legislative intent lead inexorably to the

conclusion that Congress reserved such authority exclusively to itself.

> *[I]n the judgment of this committee – this includes Senators . . . of a pretty conservative political persuasion – Congress has the duty to say,* "This is what ought to be done in the interests of the health of the country."
>
> * * *
>
> *Then industry should go to work over the next 5 years to either make it possible or, if it proves to be impossible, ask Congress to change the policy.*
>
> * * *
>
> *That is all there is here, and it is tough. [W]e understand it is tough.*

Senator Muskie, Chair of the Senate Subcommittee on Air and Water Pollution and chief sponsor of the Clean Air Act Amendments, in floor debate on the committee bill, September 21, 1970. "A Legislative History of the Clean Air Act Amendments of 1970" (January 1974) ("Leg. Hist."), 240.

SUMMARY OF ARGUMENT

The statutory directive to set NAAQS that are "requisite to protect the public health," with "a margin of safety," is a directive to set standards that will protect the American people from the diseases of air pollution. Application of the traditional tools of statutory construction demonstrate that costs are not a factor that Congress has allowed to be considered in setting standards to protect the public health.

The 1970 Amendments to the 1967 Air Quality Act, the legislative history, the pre-enactment administrative actions incorporated into the Act by reference, the meaning of public health derived from the statements of the members, prior agency interpretation and the meaning of the term under the police power, the overall statutory scheme, the problem to be solved and the historical context in which the Amendments were enacted, and various subsequent enactments affirming the 1970 Amendments and granting temporary relief from deadlines, but not the health standards, when Congress determined the economic consequences of implementing the Act to be unacceptable, all demonstrate that Congress required EPA to set standards based exclusively on "the latest scientific knowledge" of the effects of air pollution on health. The Act does not authorize EPA to make tradeoffs between costs and the protection of public health when setting NAAQS. On the contrary, the history of the Act makes clear that Congress reserved to itself the sole power to decide whether to postpone protecting the public health in order to serve other societal interests.

Thirty years of still-evolving economic theories of regulation and the hindsight of the social, economic and public health costs and benefits of implementing the Act's standards do not provide a permissible basis for imposing a judicial gloss that transfers to a politically unaccountable agency a policy choice Congress reserved to itself.

Whether evidence of a threshold for fine particles is ultimately discovered or not, the non-threshold status of a pollutant is not relevant to determining Congress's intention with regard to consideration of costs. Congress

rejected the no-effects, or zero risk, approach to setting standards. Instead, Congress required standards to prevent "adverse effects" based on the "latest scientific knowledge," granted the Administrator discretion to determine what an adverse effect is, and delegated broad latitude to set margins of safety provided that such protection could be demonstrated to be "requisite to protect the public health."

The Court of Appeal's construction that costs play no role in setting standards under § 109 should be affirmed.

ARGUMENT

Certiorari in this case is limited to the question of statutory construction decided by the Court of Appeals in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980). Nonetheless, industry parties raise questions related to the scientific basis for EPA's choice of standards, argue that EPA failed to explain its choice of standards within the continuum of options considered, rely on academic notions of what makes good public policy with regard to how costs should be weighed in these types of decisions, and ask the Court to make judgments about the wisdom of EPA's standards. In making these arguments, ATA and others would have this Court exceed its proper role by asking that it weigh more heavily the policy preferences of some economists and those industries that bear the costs of protecting public health from the adverse effects of their pollution than the policy choice made by

Congress as evinced by traditional tools of statutory construction.

> In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See TVA v. Hill (citations omitted). *Industrial Union Dept. v. American Petrol. Inst.*, at 688 (Marshall, J. *dissenting*).

In addition, ATA raises issues that are properly addressed as arbitrary and capricious claims. Suggestions that EPA has failed to adequately explain its choice of standards or has improperly relied upon off-the-record considerations of cost are not relevant to deciding Congress's intent in enacting § 109. These issues are, however, highly relevant to the arbitrary and capricious challenge brought below and in this Court by Citizens for Balanced Transportation and the individual petitioners who seek to protect what statutory rights they have to standards that will ensure the air they breathe is safe and will not impair their health. If the Court deems those issues appropriate for review, CBT invites the Court to grant its still pending petition for certiorari. See No. 99-1442. But these issues are not properly presented for decision based on the question of statutory construction raised in ATA's petition and certified in this case.

To the extent the Court considers ATA's policy arguments relevant to this case, the Court should also consider what the consequences of making tradeoffs between costs and health protection might be. In addition to the sensitive populations of breathers whose well-being, vitality, productivity, and very survival are required to be protected, many other interests benefit from EPA's traditional approach to standard setting. Not the least of these are most of the polluting industries challenging these standards who are now protected by a measure of certainty that they will not be the targets of perpetual damage and other tort claims based on evidence that their emissions harm human health. We explore some of these benefits, *infra*, to demonstrate the wisdom of Congress' decision to settle, periodically, in one national proceeding the levels of air quality needed to protect the public from scientifically provable harm. All these beneficial interests must be weighed in the balance if they are considered at all.

I. STATUTORY ANALYSIS INDICATES CONGRESS DID NOT AUTHORIZE EPA TO CONSIDER COSTS AS A RELEVANT FACTOR IN SETTING NAAQS.

In this case, the traditional tools of statutory construction clearly demonstrate that Congress did not delegate to EPA authority to consider costs as a factor that might be used to offset the degree of health protection to be required by national air quality standards. The relevant and probative indicators of legislative intent include –

- The amendments to the Act from 1967 to 1970;
- the discussion of factors relevant to setting standards in the legislative history;
- the administrative practice applying the public health mandate of the 1967 Act as embodied in the pre-enactment criteria documents;
- the statutory directive to set the new NAAQS based on the pre-enactment criteria documents which did not include considerations of cost;
- the intended meaning of "public health" as revealed by congressional hearings and debates;
- the commitment of the common law and the scope of the police power to protect public health as the underlying legal context for congressional action;
- the historical context and the problem Congress was trying to solve;
- the specific identification of costs as relevant to some standards but not to standards under § 109; and
- subsequent enactments that affirm § 109 as originally enacted and that provide temporary relief to specific industries that were considered by Congress to be especially burdened with the costs of compliance.

Together, these all point consistently and inexorably to the conclusion that Congress retained the ultimate authority to make any tradeoffs between health protection and the public and private costs of providing health protection.

A. The 1970 Amendments

The 1970 Amendments made two key changes to the Clean Air Act that demonstrate the error of petitioners' arguments: 1) repeal of the technology factor listed in § 108(c)(1) of the 1967 Act requiring that air quality standards adopted and submitted to HEW for approval be "consistent with the air quality criteria *and recommended control techniques* issued pursuant to section 107" (emphasis added), along with the failure to include any similar instruction to the Administrator to consider control techniques or costs in the 1970 language of § 109(b); and 2) repeal of the requirement in 107(b) of the 1967Act that information on control technology and costs of control be issued to the States whenever the Secretary issued air quality criteria.

1. 1970 Act Repealed Control Techniques As a Relevant Factor.

Petitioners' textual argument relies heavily on the contention that the Administrator's obligation under § 108(b) to provide information to the States on available technology and costs demonstrates that these factors are relevant to the NAAQS decision. But this argument does not survive scrutiny.

First, the 1967 Act made "recommended control techniques" expressly relevant to the setting of standards by the States, § 108(c)(1), but did not allow technology factors to override the primary objective of protecting public health. The 1967 Act required that the air quality standards adopted by the States meet both tests, i.e., be "consistent with the air quality criteria and recommended

control techniques. . . . " *Id.* The 1967 Act did not authorize the Secretary to consider costs in approving air quality standards; only the criteria and "recommended control techniques" were identified as relevant factors. Nor did the 1967 Act authorize the Secretary to approve air quality standards if they were consistent with available technology, but not the air quality criteria. Both had to be met to receive federal approval.

As Commissioner Middleton of the National Air Pollution Control Administration ("NAPCA"), an agency of the Department of Health, Education and Welfare ("HEW"), explained to the Senate committee in 1970, the Administration was implementing the 1967 Act by requiring that "[t]he criteria documents state the level at which effects begin. . . . The Clean Air Act provides that the standards shall be protective of health, which means they must be lesser than the level at which this thing [effect] was observed." Leg. Hist., 1185. As an example, he pointed to the evidence in the Air Quality Criteria documents for SO2 and particulate matter showing the lowest levels at which adverse effects were observed for each pollutant, and explained that "[s]tandards that are acceptable to the Secretary are those less than that number." *Id.*, 1187.

The Administration's implementation of the 1967 Act did not allow for tradeoffs between the recommended control techniques and standards adequate to protect against the lowest pollution levels proven to cause adverse effects. Rather, the best reading of the 1967 Act is that both of the statutory factors had to be satisfied, i.e., that the Secretary could disapprove a State's standard if it failed to either require air quality cleaner than levels

proven to cause harm, or if the State failed to take advantage of the levels of control that could be achieved with recommended control techniques. But nothing in the 1967 Act or its implementation by HEW suggested that either the private costs incurred by polluters or the public costs of control were relevant to setting air quality standards.

In the 1970 Act, Congress deleted the requirement that standards be based on considerations of control technology; "recommended" or otherwise. The only relevant factors that remained in the text of § 109(b) for setting primary standards were "requisite to protect the public health," "allowing a margin of safety," and basing the standards on the "criteria." Factors mentioned for secondary standards include "requisite to protect the public welfare" which Congress defined in § 302(h), "known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," and basing the standards on the "criteria."

2. Pre-1970 Criteria Show Congress Did Not Intend Costs to be Relevant.

There is no basis for the inference petitioners attempt to draw that reference to the "criteria" itself imports some notions of cost into the realm of factors relevant to setting standards. The nature and scope of the five "Air Quality Criteria" documents was known to Congress. NAPCA issued the "Air Quality Criteria" for SO2 and PM in January 1969, and the Criteria for photochemical oxidants (including ozone), hydrocarbons and carbon monoxide were issued in March 1970, only weeks following the President's message proposing amendments to the Act.

The criteria documents were mentioned in committee hearings and floor debates by Senator Muskie and other members, and explained at committee hearings by Commissioner Middleton and other representatives of the Administration. Review of these criteria documents reveals that they contain no discussion of control techniques or costs except for the economic costs caused by pollution in the ambient air. Nothing in the criteria documents or the discussions of them by members or hearing witnesses would have led any member of Congress to believe that reference in the Act to "criteria" incorporated a subtext that was understood to mean "costs."

Furthermore, the 1970 Act directed the Administrator to "publish proposed" primary and secondary NAAQS within 30 days following enactment of the Amendments "for each air pollutant for which air quality criteria have been issued prior to such date of enactment." § 109(a)(1)(A). Final NAAQS were required 90 days thereafter. § 109(a)(1)(B). EPA met these deadlines. Obviously, Congress knew enough about the content of the pre-enactment air quality criteria to require that standards be issued based on them. No time was allowed for further criteria development. Nor was there any suggestion that criteria that omitted all consideration of costs were inadequate to support the promulgation of national standards.

3. 1970 Act Repealed Requirement to Revise Control Technique Information When NAAQS Are Revised.

In addition, Congress removed the linkage between information on control techniques and any future

revisions to the NAAQS. Section 109(b)(1) allowed the Administrator to "revise[ ]" standards "in the same manner as promulgated," which required only that they be based on the "criteria." The inference in the 1967 Act that future revisions to the criteria be coupled with the issuance of revised technology and cost information was removed. The new § 108(c) required only that "[t]he Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria *or* information on control techniques. . . . " The disjunctive eliminated any obligation to reissue control technique information when the air quality criteria were revised.

The only linkage that remained in the 1970 Act between the issuance of control technology information and the issuance of criteria or the proposal of NAAQS was when new criteria required by § 108(a)(2) were issued following the listing of a new pollutant under § 108(a)(1). See § 108(b)(1). This provision has been triggered only twice by EPA's listing of nitrogen oxides in 1971 and lead in 1976 as new criteria pollutants. Revisions of a NAAQS, such as the standards at issue here, no longer trigger an obligation to issue revised information on control techniques and costs.

But even this last vestige of the prior link between technology information and standards cannot reasonably be read to imply that control technique information was ever relevant to the NAAQS decision. Congress directed the Administrator to issue the information to the States and air pollution control agencies, not to use it himself for any responsibility he had under the Act. Obviously, this provision carries over from the 1967 Act when such information was relevant to both standard setting and the

development of abatement plans by the States. After the 1970 Amendments, the information continued to be relevant only to the States' obligation to develop emissions standards as part of the State implementation plans required by § 110. The Act no longer made it relevant to setting air quality standards.

Certainly, Congress understood that continuing to provide control technology information was to support the States' efforts to develop implementation plans: "The Committee recognizes that the States will continue to need this information to develop meaningful programs for implementation of ambient air quality standards on a regional basis. * * * The Committee intends that the information provided pursuant to this section should serve as guidance to the States, not as limitations on control technology innovation." S. Rep. No. 91-1196 (1970), 9 (Leg. Hist., 409). Nothing in this history suggests that this information was intended to be relevant to the Administrator's NAAQS decision.

Taken together, these many changes to the statutory requirements governing promulgation of air quality standards, issuance of criteria and information on control technology and costs make clear that Congress intended that NAAQS decisions be based solely on the kinds of health effects information contained in the pre-enactment air quality criteria. Nothing in the statutory text, or Congress's express reliance on the pre-enactment air quality criteria for setting the new NAAQS, suggest any hint of requiring EPA to expand the scope of criteria documents to include information on factors other than "the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such

pollutant in the ambient air, in varying quantities." § 108(a)(2). To the extent that costs might have been a relevant factor for setting air quality standards under the 1967 Act, the 1970 Act removed any linkage between national air quality standards and costs or technology as relevant factors.

B. "Public Health" Was Uniformly Understood as Impairment of "Human Health" by the Diseases of Air Pollution; Not Costs.

Petitioners' other textual argument from the 1970 Act is that the phrase "requisite to protect the public health" itself imports the notion that costs may be considered to justify standards that fail to protect against significant adverse health effects.[1] This notion may derive its philosophical basis from *1984*, but one must hope that such

---

[1] Some of the parties and *amici* supporting ATA reject this extreme view, and acknowledge that there are limits to how far costs can be relied upon to diminish the levels of health protection a NAAQS must provide. Appalachian Power, at 25, concedes that even under an interpretation of "public health" that incorporates costs, a distinction must be made between "demonstrated adverse" health effects and predicted risks of harm. "NAAQS must be set below the level at which such demonstrated adverse public health effects occur." Similarly, Senator Hatch and Congressman Bliley, at 23, accept the view adopted by the *en banc* D.C. Circuit in *Vinyl Chloride* that "The Administrator would not comply with section 109 by setting a standard that did not protect against the level where scientific data demonstrate a significant risk to the public health; she would have failed to set a standard 'requisite to protect the public health.' "

Orwellian twists of phrase have not become the stuff our laws are made of.

If such an understanding of the term "public health" were so in vogue in 1970 as petitioners would have the Court believe, one would think that somewhere in the 1600 pages of compiled legislative history there would be an inkling that someone – the President perhaps, or an administration official, or an erudite member of Congress from Massachusetts – shared this view. But it is a telling commentary that after all the citations to obscure journals and academic treatises, petitioner ATA's entire brief contains only one citation to the legislative record from 1970. Br. at 42, n.2. And that citation is not to anything Congress did, but to the first annual report of the President's Council on Environmental Quality which provided one of the estimates of the cost of air pollution control available to Congress.

But CEQ's report also identifies the need to make those expenditures to prevent the "threat to human health," to address "the primary public health concern", to reduce pollution where "adverse health effects have been observed." Leg. Hist., 246-47. The term "public health" was used interchangeably with other similar terms throughout the CEQ report, and throughout the legislative history. A typical example of how the phrase was used by CEQ is shown in this summary of 20th Century disease trends:

> The incidence of chronic diseases has soared sharply during this century, while the infectious diseases which were the primary public health concern in the past have been brought under control. Heart and blood vessel diseases caused

> more than half the deaths in the United States in 1962. Lung cancer, once a rarity, now kills more persons than all other cancer types combined. Emphysema has doubled every 5 years since World War II. Air pollution has been linked to asthma, acute respiratory infections, allergies and other ailments in children. Leg. Hist., 246.

"Public health" was short-hand for a collection of terms that were generally used to communicate the concept that the health of a large number of people is affected by causes that are associated with conditions beyond the control of individuals.

1. "Public Health" As Congress Used the Term.

Ultimately, the inquiry should turn on how members of Congress used and understood the phrase in their discussions. There is no evidence that Congress understood it to include even the public costs of protecting health. It certainly was not understood to include the private costs of pollution control.

When Senator Muskie, chair of the Air and Water Pollution subcommittee and principal sponsor of the bill, introduced the committee bill on the floor, he used a number of terms referring to public health interchangeably. He made clear that the philosophy of the bill rejects "[p]redictions of technological impossibility or infeasibility . . . as reasons to avoid tough standards and deadlines, and thus to compromise the **public health**." Leg. Hist., 229. He quoted from the Senate report on the 1967 Act which declared that "the nation's air resources

are to be conserved and enhanced to the point that generations yet to come will be able to breathe without fear of **impairment of health**." *Id.* The bill, he explained, represents a commitment by Congress to "effective protection of the **health of all Americans**." *Id.*, 230. It "is not too soon to be concerned about the **health effects** of automobiles on the lives of the people. . . . " *Id.*, 232. "Here, in the case of a national objective more serious than [building war planes or sending a man to the moon] – the **national health**, we have an obligation to lay down the standards. . . . " *Id.* None of these terms were used to imply a subtext that includes cost. On the contrary, the consistent theme throughout the legislative process was that costs and technology should not be factors because they would delay a solution to the air pollution problem.

This is most clearly revealed in the crucial floor debate over the provisions forcing the auto industry to meet tailpipe standards that demanded a 90% emissions reduction beyond the standards issued under the 1967 Act; a level of reduction demonstrated only with experimental vehicles. Leg. Hist., 233-40. Senator Griffin of Michigan challenged the technology-forcing auto tailpipe standards because the result could be the shutdown of an industry that accounts for 1 of 7 jobs nationwide, and because the costs of producing clean production-line vehicles were unknown and "would not be taken into account." *Id.*, 237-40. In response, Senator Muskie admits "I do not think anyone knows [what this will cost]." *Id.*, 238. But he defends the bill by summarizing the evidence of health effects from the criteria document for carbon monoxide (a pollutant emitted almost entirely by motor vehicles), and then explains: "We are saying in this bill

that this is what the **public health** requires." *Id.*, 236. "[O]ur responsibility is to tell the industry what the **public health** requires." *Id.*, 238. "The deadline is based not on economic and technological feasibility, but on considerations of **public health**." *Id.*, 239.

This debate, more than any other evidence of intent from the 1970 history, demonstrates that the cost factors now argued by petitioners to be included within the alleged common understanding of public health, were understood then to be in conflict with the commonly understood meaning of public health. Senator Griffin argued for including authority in the bill to allow an expert agency to consider cost and technology when setting or adjusting standards and deadlines. But Senator Muskie clearly rejected inclusion of those factors because they conflicted with achieving protection of the public health. If petitioners' view of the Act were right, Senator Griffin would have had no reason to oppose the bill.

Although this debate centered on the tailpipe standards of the Act and not the NAAQS, it is nonetheless probative of how Congress viewed the term "public health." It is also relevant to construing § 109(b)(1) because the technology-forcing policy underlying the tailpipe standards was embodied in the NAAQS language as well. As Senator Muskie made clear when he presented the committee bill, "it is now clear that continued reliance on gradual reductions in automotive emissions would make achievement of the ambient air quality standards impossible within the national deadlines established in Title I of this act." Thus both the NAAQS and the tailpipe standards reflected the philosophy of the bill that rejected

"[p]redictions of technological impossibility or infeasibility . . . as reasons to avoid tough standards and deadlines, and thus to compromise the **public health**." Leg. Hist., 229.

Similar remarks were made by other members indicating that Senator Muskie's understanding that public health was short hand for human health was shared widely. Senator Nelson: "This bill before us is a firm congressional statement that all Americans in all parts of the Nation should have clean air to breathe, air which does not attack their health." *Id.*, 378. Senator Randolph, chair of the Public Works Committee: "The pending bill would require the establishment within 3 to 5 years of its enactment State implementation plans to achieve national ambient air standards to protect the health of citizens of this country." *Id.*, 286. Senator Murphy: " . . . the air pollution problem is . . . a menace to the health and welfare of our people." *Id.*, 329. Senator Scott, minority leader: "Unless this outpouring of contaminants is controlled, . . . we may very well experience . . . a snowballing adverse effect to the health and safety of our citizens." *Id.*, 349. Senator Young: " . . . within 5 years, the air in our cities will be fit to breathe, no longer endangering the health of our citizens."

The kinds of health effects that members talked about are also important to their understanding of public health. They referred to the health effects discussed in the CEQ report – lung cancer, bronchitis, asthma, cardiovascular disease – ; not the health effects attributable to unemployment or the "poverty effect" on health. Senator Murphy, for example, cited numerous scientific journal articles as well as reports from the popular press linking

these kinds of adverse effects to air pollution. *Id.*, 326-27. Members also quoted studies reported in NAPCA's criteria documents, such as the evidence that carbon monoxide exceeded safe levels in Chicago more than 20% of the time. *Id.*, 236.

Members clearly understood the threat of air pollution to public health to be the diseases experienced by people as a result of their exposure to pollution. With this understanding of "public health," this term cannot be distorted into the vehicle for making costs relevant to setting NAAQS.

2. "Public Health" As the Agency Applied the Term.

The phrase "requisite for the protection of the public health" was not new to the 1970 Act. It was carried over from § 107(b)(1) of the 1967 Act which established the statutory benchmark for issuing air quality criteria to the States. The interpretation of "public health" by the agency charged with carrying out this mandate provides reliable evidence of what Congress most likely intended in 1967, and compelling evidence of how Congress would have expected the term to continue to be applied under the amended Act. The five Air Quality Criteria issued prior to enactment of the 1970 Amendments provide the best evidence of how the Secretary of HEW understood the meaning of "public health."

Most relevant here are the "Air Quality Criteria for Particulate Matter" and the "Air Quality Criteria for Sulfur Oxides," the first two to be issued under the 1967 Act. In both documents, in the Preface, at iii, NAPCA Commissioner Middleton wrote:

> Air quality criteria tell us what science has thus far been able to measure of the obvious as well as insidious effects of air pollution on man and his environment. Such criteria provide the most realistic basis that we presently have for determining to what point the levels of pollution must be reduced if we are to protect the **public health** and welfare.

The Introduction to both Criteria, PM at xiii and Sulfur Oxides at x, which were required by the 1967 Act to determine what is "requisite to protect public health," explain that

> Air quality criteria are an expression of the scientific knowledge of the relationship between various concentrations of pollutants in the air and their adverse effects on man and his environment. * * * Air quality criteria are descriptive; that is, they describe the effects that have been observed to occur when the ambient air level of a pollutant has reached or exceeded specific figures for a specific time period. * * *
>
> Technological and economic aspects of air pollution control are considered in companion volumes to criteria documents. [See] *Control Techniques for Particulate Air Pollutants* [or *Sulfur Oxide Air Pollutants*].

These documents clearly reveal that HEW considered only the evidence of harm to humans that was attributable to levels of pollution in the ambient air as relevant to its task of providing the information "requisite to protect public health." The separation of health effects information into the criteria and cost information into control

techniques documents also show that information regarding cost was not included in the criteria, and not considered relevant to determining what is "requisite to protect public health."

This agency approach to the development of air quality criteria and approval of standards was consistently applied to the remaining criteria issued prior to the 1970 Amendments. During consideration of the Amendments, no member questioned the agency's approach to developing the information relevant to the standard setting decision. When Congress enacted into the new §§ 108(a)(2) and 109(b)(1) language that required protection of public health – indeed, language that closely paralleled the language in the 1967 Act – the only reasonable inference is that Congress also intended to retain HEW's understanding that "public health" meant only the adverse effects of pollutants on human health.

3. The Law's Understanding of "Public Health."

As a term of art, "public health" had then, and continues to have, a special meaning in the law. For nearly two centuries, the common law has treated conduct or uses of land that "involve a significant interference with the public health" as a public nuisance. Restatement (2d) of Torts, § 821B. In constitutional jurisprudence, this Court has recognized the protection of public health as one of the legitimate objects of the police power of the state. "[The police power] is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement

. . . of whatever may be regarded as a public nuisance." *Lawton v. Steele*, 152 US 133, 136 (1894). In the abatement of a nuisance, the Court has held that the Fifth and Fourteenth Amendments recognize no protectable property interest in the instruments used to create the nuisance. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Goldblatt v. Town of Hempstead*, 369 US 590, 593 (1962), *citing Mugler v. Kansas*, 123 US 623, 668 (1887).

The draft Restatement (2d) being circulated in April 1970, defined a public nuisance as "a criminal interference with a right common to all members of the public." Restatement (2d), Tentative Draft No. 16 (American Law Institute, 1970). The Reporter who authored the Draft concluded after reviewing the cases that "a public nuisance is always a crime." To support his conclusion, he cited the conclusions of numerous text writers who were unanimous on the point. As an example he quoted 1 Wood, Nuisances (3d Ed. 1893), 39: "Every person owes certain duties to the public. * * * Among these duties is that of so using his property as not to injure the public * * * that it is treated as a public offense, and is Punishable by fine or imprisonment."

Costs have never been recognized as a defense to crimes or a lawful exercise of the police power to prevent a significant interference with public health. The law requires no weighing of private economic interests before an injunction would issue to abate such offenses.

Indeed, when Senator Muskie declares in his speech introducing the bill that – "The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons." Leg. Hist., 227 – he sounds much more like a judge in equity applying the law of public nuisance to abate a significant interference with the public health than a graduate school professor offering a theory of public health policy. And when the Senate report explains that "[a]n ambient air quality standard is sufficient to protect the health of such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air," it sounds very much like a test for determining pollution levels that must be reached to prevent a significant interference with public health. Thus to the extent Congress might have had a broader frame of reference than the implementation of the 1967 Act by HEW for its intended meaning of "public health," it was most likely the way the law had used the term for a century or more to define conduct that could be summarily abated under the police power.

Given the total absence of congressional references to textbooks written by professors at graduate schools of public health, it is wholly improbable Congress intended the meaning suggested by petitioners. A broad study of public policy aimed at defining targets for the investment of public and private resources to protect public health, or even a narrower inquiry into the environmental protection programs likely to protect the most lives, as in

Breyer, *Breaking the Vicious Circle*, might well consider the best-bang-for-the-buck in developing public health programs. But by 1970, Congress had obviously advanced well beyond the point of having chosen improved air quality as an appropriate program for protecting the health of the nation. Congress did not assign to EPA responsibility for deciding whether its budget would best be spent on achieving a safe level of air quality. Congress declared unequivocally that its purpose was to "authorize a massive attack on air pollution." S. Rep., 1 (Leg. Hist., 401). To this end, Congress directed EPA to set standards that would ensure "an absence of adverse effect on the health of . . . persons in sensitive groups from exposure to the ambient air." *Id.*, 10. And "determined that existing sources of pollutants either should meet the standard of the law or be closed down. . . . " *Id.*, 3. It directed EPA to set NAAQS requisite to protect the public health, i.e., to protect the public from the diseases of air pollution. It did not delegate to EPA authority to decide whether the costs of controlling emissions might be better spent on some other public health program.

Only Congress may reverse its determination that standards must protect public health without regard to economic consequences. As discussed, *infra*, Congress has provided relief from the economic consequences of strictly applying such standards on numerous occasions, but it has never reversed its decision that standards for protecting public health be based solely on the evidence of harm caused by pollutants in the ambient air.

C. Legislative History Reveals No Expectation That Costs Are a Relevant Factor.

The legislative history of the 1970 Act confirms the conclusions drawn from a straightforward reading of the statutory text. Costs are discussed only as relevant to the control techniques guidance to be provided the States under § 108(b); nowhere else.

The source of legislative intent most relevant to § 109(b) is the Senate committee report because the text of the final bill bears little relationship to the House bill. The House bill would have required promulgation of national standards "for any pollutant or combination of pollutants which . . . endanger or may endanger the public health or welfare," Leg. Hist., 911, but provided no guidance whatsoever regarding the factors relevant to determining the stringency of the standards. Had the House bill become law, it might have been implied that Congress delegated virtually unlimited power to the Administrator to determine relevant factors, including costs. But an Administrator's decision to weigh costs as a factor in justifying standards that fail to protect against adverse health effects would not have resolved the kind of constitutional objections raised by Chief Justice Rehnquist in the *Benzene* case to such an unlimited grant of legislative power.

The law was drawn from the Senate bill which did prescribe a controlling factor for setting standards, to wit, "shall be . . . standards the attainment and maintenance of which are necessary to protect the health of persons." Leg. Hist., 486. The conference committee, reverting back to the language in the 1967 Act, adopted the controlling

phrase "requisite to protect the public health." This language gave direction to the Administrator to set standards at the level needed to protect the public health. Given the common understanding of public health, *supra*, the statutory text provided no authority to consider costs.

The Senate report provided guidance regarding the kinds of populations and the types of evidence Congress considered relevant to setting standards. The report advised that standards need not "provide for the quality of air required to protect those individuals who are otherwise dependent on a controlled internal environment," but emphasized "that included among those persons whose health should be protected . . . are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment." S. Rep., 10 (Leg. Hist., 410). Thus, if people with serious afflictions are healthy enough to be out in the world, the air should be safe for them to breathe.

Congress also provided guidance regarding the measure of harm that should be used to select the level of the standards.

> Ambient air quality is sufficient to protect the health of such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air. An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent or class of such agents (related to a period of time) which will protect the health of any group of the population. *Id.*

Finally, the report also emphasized that

> In setting such air quality standards the Secretary should consider and incorporate not only the results of research summarized in air quality criteria documents, but also the need for margins of safety. Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified. *Id.*

The margin of safety was added, no doubt, to provide legislative authority for the agency practice described by Commissioner Middleton by which air quality standards "must be lesser than the level at which this thing [effect] was observed. In addition, we say that a margin of safety must be included." Leg. Hist., 1185.

None of the factors Congress identified as relevant to setting NAAQS in the report or elsewhere during the legislative process even suggests that costs are relevant. The primary emphasis is on providing protection against pollution levels for which "the latest scientific knowledge," § 108(a)(2), shows an "adverse effect," and then adding a margin of safety to account for possible effects not yet demonstrated. At a minimum, known or proven effects must be protected against before the Administrator – in the context of setting a margin of safety – may make judgments concerning what degree of protection to add against suspected effects.

In context, the factors discussed in the Senate report are consistent only with the meaning of public health discussed *supra*, that standards are to be set to prevent the diseases of air pollution. Clearly, the concept of

adding a margin of safety is fundamentally at odds with considering factors, such as costs, that might weigh against providing a full measure of protection against levels of pollution that are shown to be associated with the diseases of air pollution. It argues for a construction that uncertainty be weighed in favor of protection, and not setting standards at the margin of adverse effects. Such a policy is not consistent with considering costs.

D. The 1977 Amendments.

The 1977 Amendments affirmed the policies adopted in the 1970 Act including Congress's decision that standards be set solely on the basis of the evidence of harm to health. The strongest evidence supporting this conclusion is that Congress did not amend § 109(b). Other compelling evidence includes the enactment of § 109(d)(1) requiring the periodic review and revision, as appropriate, of both the criteria under § 108 and the standards "in accordance with section 108 and subsection (b) of this section;" and the enactment of a required economic impact statement for enumerated standard setting provisions of the Act, but not including NAAQS.

Taken together, these changes requiring that 1) air quality criteria issued under § 108, but not control techniques information, be reviewed and revised every five years as part of the NAAQS review process; 2) that the review and the need to revise NAAQS be based on the same statutory language as enacted in 1970; and 3) an economic impact assessment be required for some standards but not the NAAQS; demonstrates Congress's re-

affirmation of its 1970 decision not to require consideration of costs as relevant to the NAAQS decision.

1. The New Duty to Review and, As Appropriate, Revise the NAAQS.

ATA attempts to build an entire house of cards out of a single phrase in the CASAC amendment, § 109(d)(2)(C)(iv), which calls upon CASAC to "also . . . advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." In context, that assignment of authority to CASAC must be seen as independent from its responsibilities to advise the Administrator regarding the need for revision of NAAQS.

The CASAC amendment sets out two separate areas of responsibility for the Committee. The first is governed by subparagraph (d)(2)(B), and establishes a statutory schedule for CASAC to "recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria as may be appropriate under section 108 and subsection (b) of this section." CASAC's statutory schedule dovetails with the schedule governing EPA's review and revision of the NAAQS under (d)(1), requiring its recommendations to be provided a year in advance of the Administrator's deadline. Furthermore, CASAC's recommendations are not unconstrained. The Committee is, as is the Administrator, required to base its recommendations on the relevant statutory factors established by § 109(b). The House committee made clear its expectation that under the review and revise amendment,

"[t]he Administrator is required to promulgate new standards and revise existing standards as are appropriate under the terms of section 109(b) of the Act." H. Rep. No. 95-294 (1977), 182. The explicit reference to § 109(b) as the relevant guide for CASAC's recommendations makes clear that Congress did not empower CASAC to consider any factors not relevant to the Administrator's decision to set or revise NAAQS under subsection (b).

Separately, and not related to their recommendations on the revision of NAAQS, § 109(d)(2)(C) also empowers CASAC to offer advice, not recommendations, on other matters. Included among these subjects are various effects which might result from strategies that might be adopted to implement the NAAQS. In contrast to (d)(2)(B) which calls for recommendations expressly tied to the decision under § 109(b) and the schedule for NAAQS review, none of the subject areas of advice invited by Congress under (d)(2)(C) are related to any particular decision to be made by the Administrator. The House committee explained that "this advice may be of interest and assistance to the States and to Congress in fashioning future legislation." H. Rep., 183. It certainly could also be relevant to EPA in the event the Agency found itself promulgating federal implementation plans for States under § 110(c).

ATA's argument that the directive to provide general advice on the economic effects of implementation strategies provides authority for consideration of costs when setting NAAQS is a bootstrap argument that would impermissibly overrule Congress's explicit directive that CASAC's recommendations on NAAQS be addressed solely to factors that are appropriate under § 109(b).

Nothing in the revision requirements of § 109(d) even hint at the possibility that Congress intended to modify its decision in 1970 to base NAAQS solely on evidence of harm to public health.

2. New Requirement for Economic Impact Analysis of Standards.

If Congress had intended in 1977 to add costs to the NAAQS decision, it certainly had a context for doing so when it required economic impact assessments for other standards. But it clearly rejected that option. As finally enacted, § 317, 42 U.S.C. § 7617, requires 1) "the costs of compliance," 2) "potential inflationary or recessionary effects," 3) "effects on competition," 4) "effects . . . on consumer costs," and 5) "effects . . . on energy use" to be considered as part of the development of a standard. But by its terms, the section only applies to the specific standards enumerated in subsection 317(a).

These enumerated provisions of the Act were those for which costs had been explicitly identified as relevant factors in the controlling statutory section, as, for example, new source performance standards under § 111 and new discretionary tailpipe standards under § 202. Section 109(b) was notably missing from the list. Nor was Congress's omission of § 109(b) inadvertent. "Nor is this section intended to alter the statutory basis for rulemaking under any section of the Act. Economic factors referred to in this section may be considered by the Administrator only to the extent allowed by the basic substantive provision." H. Rep., 53.

This explanation of § 317 by the House committee makes clear that Congress intentionally chose to require consideration of costs for some standard setting provisions of the Act and not others; that Congress did not expect costs to be considered under provisions where costs were not mentioned as relevant factors such as § 109(b); and that Congress chose not to revise its 1970 decision to exclude costs from § 109(b).

E. 1990 Amendments.

In 1990, Congress once again did not amend § 109(b). Nor was the duty added by § 109(d) to review and revise in accordance with subsection (b) amended.

The only amendment related to NAAQS was the addition of a requirement for the preparation of periodic economic impact analyses "associated with compliance with each standard issued for – (1) a criteria air pollutant subject to a standard issued under section 109." § 312(a)(1). This provision required a retrospective analysis one year after enactment, and a prospective analysis biennially thereafter. The provision does not direct the Administrator to take the results into account when setting or revising NAAQS. Where Congress did require that the results of the economic impact assessment required by § 317 be taken into account when the affected standards were being adopted, but did not require a similar result here, it can only be concluded that Congress did not intend the information developed for the economic impact analysis required by § 312 to be relevant to the NAAQS decision.

F. Structure of the Act Indicates Congress Intended Costs be Considered When Imposing Control Obligations on Sources, But Not in Setting NAAQS.

The overall structure of the Act shows that Congress chose carefully when costs should be considered and when not. As a general rule, costs are identified as a relevant factor when deciding the degree of emissions reduction to be required of specific sources or source categories. In contrast, costs are excluded from the decision when the health protection targets of the Act are being determined. This scheme is consistent with the intended meaning of "requisite to protect the public health," *supra*.

The degree of emissions control required on existing stationary sources is primarily governed by the requirements for State implementation plans in §§ 110 and 172 of the Act, and controls on major new or modified stationary sources are governed by the new source performance standards adopted nationally for various source categories, and the case-by-case requirements for new construction permits in §§ 165 or 173, depending on whether the source is located in an area designated "nonattainment" or "attainment/unclassifiable" under § 107(d). Emissions standards for motor vehicles are governed by § 202, and other sections of Title II provide for standards on other mobile sources such as aircraft and construction equipment. Standards for motor vehicle fuels are set under § 211. All of these provisions include explicit consideration of costs, except for § 173 which relies upon a technology-based standard for determining the control

requirement for major stationary sources in nonattainment areas. Standards for fuels under § 211 must consider costs if the standards are based on factors related to the performance of motor vehicle engines, § 211(c)(1)(B), (2)(B), but not when the standards are set to protect public health under § 211(c)(1)(A), (2)(A).

The only provision of the Act that requires more emissions reductions than those obtained by taking cost factors into account are the requirements of §§ 110(a)(2) and 172(c) requiring implementation plans to provide for attainment of the NAAQS. In most areas of the country, States can demonstrate attainment by satisfying the "reasonably available control technology" requirement for stationary sources and the "reasonably available control measures" requirement to reduce emissions from vehicle use and other area emissions. § 172(c)(1). Only in the more heavily polluted areas are less cost-effective controls or technology-forcing requirements needed to attain by the statutory deadlines.

But where this scheme has imposed widespread burdens on industries that Congress considers important to the national interest, Congress has not been reluctant to intervene to protect those industries from the consequences of strict implementation of the NAAQS and the statutory deadlines. Four classic examples are 1) the provisions in § 125 establishing a procedure for relieving major fuel burning sources from requirements that might result in shutdown and major economic dislocations; 2) the ten-year waiver allowed by § 119 (1977) for existing nonferrous smelters from the requirement to meet the NAAQS by installing continuous emission control technology; 3) the Steel Industry Compliance Extension Act of

1981, § 113(e) (added 1981, repealed 1990), that allowed large integrated steel plants to stretch out their compliance programs beyond the deadlines established in the 1977 Act, and 4) amended § 202 that granted the extension to 1981 of the original deadline in the 1970 Act for autos to achieve the required 90% reduction in tailpipe emissions by 1975. Congress has also given governors general authority to grant temporary emergency suspensions of SIP requirements. § 110(g).

This statutory scheme, as implemented with occasional interventions by Congress, demonstrates the underlying premise of this argument, i.e., that Congress reserved to itself the option to provide relief when the requirements of health-based standards have proven to impose costs or other burdens that are ultimately deemed politically unacceptable. As Senator Muskie promised in 1970, "[i]f the Congress, which would have made the policy in the first instance, is persuaded that the industry cannot do the job, Congress could change the policy." Leg. Hist., 236. And so in 1977 Congress did change the policy to give industries all across the land more time to meet the standards. But Congress did not change the underlying policy that air quality standards must be set solely on the basis of what is needed to protect public health.

The original scheme, combined with congressional interventions, has served well to promote the effective implementation of the public health protection objectives of the Act without major disruptions to the economy, without triggering massive layoffs and without causing widespread shutdowns among the nation's most polluting industries. There is nothing broken here that requires

fixing. And even if there were, it would be up to Congress to fix it; not a court.

Here the inquiry into legislative intent should end. The relevant indicators of the factors Congress considered relevant to setting NAAQS consistently lead to only one conclusion – Congress required NAAQS to be based exclusively on the latest scientific knowledge of the adverse effects of air pollution on human health. Nothing in the statutory text of the legislative history suggests that costs are relevant to that task. Clearly, Congress rejected the option of delegating to an administrative agency the authority to compromise protection of public health based on considerations of cost, and reserved to itself the exclusive power to make tradeoffs between the protection of the public from the diseases of air pollution and the public and private costs of providing that protection.

II. PROTECTING AGAINST NON-THRESHOLD POLLUTANTS DOES NOT SUPPLY AUTHORITY TO CONSIDER COSTS.

ATA and others suggest that the congressional choice not to allow costs as a relevant factor in setting NAAQS, as evinced by traditional tools of statutory construction, needs to be reconsidered because EPA's 1997 standards address pollutants that are presumed to be non-threshold pollutants. But the legislative history indicates that Congress considered the non-threshold problem. In its directive to adopt standards that "are requisite to protect the public health", "and allow[ ] an adequate margin of safety," Congress directed EPA to regulate to protect

against exposures for which "the latest scientific knowledge" establishes that adverse health effects would occur, and to add a margin of safety to protect against effects that might reasonably be anticipated to occur.

Neither of these statutory directives for standard-setting require EPA to set standards at zero unless scientific evidence demonstrates that adverse effects are proven to occur at any exposure greater than zero. Those are not the facts of this case. There is no compelling scientific evidence of adverse health effects below the range of levels considered by EPA, and the agency has not adopted zero-risk standards. But even if there were evidence of harm at such levels, the answer to the statutory construction question would remain the same – Congress did not authorize the EPA Administrator to decide that some Americans should be allowed to die because the costs of preventing those deaths is too high. But, as Senator Muskie said, Congress will be sitting and can change the policy if the consequences of a standard are unacceptable.

During the Senate hearings, after Commissioner Middleton explained "that a national air quality standard will be one that protects against the minimum adverse health effect," he was asked by Senator Eagleton whether "that is different than known no-effects." In the dialogue that followed, Leg. Hist., 1184-85, Dr. Middleton explained that they were very different.

> Dr. Middleton. To identify a no-known effects level is something that would be, in my opinion, not only extremely difficult but very likely not possible.

> I could not tell you where that level would be, because the knowledge that we have shows there is not any single level where something either begins or stops. There are a series of things taking place. Two things happen: the state of our knowledge is always in flux, improvement, and secondly, it is not that simple a decision, because the causes of destruction of lung tissue, as an example, may be the result of a series of biochemical effects that occurred earlier and that may be difficult to detect. . . .
>
> Senator Muskie. How does that relate to your national ambient air quality standard which you say would be set at the no-health-effects point?
>
> Dr. Middleton. The criteria documents state the level at which effects begin, some measurable things that are observed to take place. The Clean Air Act provides that the standards shall be protective of health, which means they must be lesser than the level at which this thing was observed.
>
> * * *
>
> Senator Muskie. But there is a no-effects area?
>
> Dr. Middleton. We know from the criteria published for sulfur oxides, that at certain levels definite adverse effects occur in the lung. We also know that at a little lower level there are more subtle effects on the action of the lung, and that below that some enzyme system begins to fail or to function improperly.
>
> The no-effect level would have to be somewhere below that. . . .

The central distinction of this dialogue is between a "no-effects" level, which is comparable to a zero risk policy, and an "adverse effects" level. The distinction is reflected in the 1969 "Air Quality Criteria for Sulfur Oxides", where studies were reported that included both changes in bodily functions, *Id.* Chapter 7, and more severe effects characterized as "increased mortality," "increased daily death rate," "increased hospital admissions," "sharp rise in illness rates," "accentuation of [chronic lung disease] symptoms," and "increased severity and frequency of respiratory diseases." These more severe effects, however, were the studies relied upon to judge effects on health. *Id.*, 161-62.

When Congress stated that "[a]mbient air quality is sufficient to protect the health of such persons whenever there is an absence of **adverse effect** on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air," S. Rep., 10, it was obviously adopting the approach followed by NAPCA in issuing its Criteria documents and its approach to approving state-submitted standards. That approach can best be described as the evidence of harm test; something significantly more than merely evidence of a detectable change that has no direct relationship to health status.

The judgment Congress made is that NAAQS should prevent "adverse effects" as demonstrated by "the latest scientific knowledge" required by § 108(a)(2) for the development of the air quality criteria, and that a margin of safety must be allowed so that NAAQS are set below the level at which harm was demonstrated. The determination as to what effects constitute an adverse effect, and how the margin of safety should be determined, was

left to the sound judgment of an expert administrator. That judgment, when exercised, must be based on reasoned decisionmaking and not be arbitrary or capricious. CAA § 307(d)(9).

The nature of the process Congress created is therefore driven by the advances in the scientific understanding of the relationship between air pollution and disease. As the science advances, if adverse effects are detected at lower levels of exposure, the Act requires the standards to be revised. But it only demands a response to evidence of adverse effect, not suspected or predicted effects. Beyond that, the Act also delegates to the Administrator discretion to consider suspected or predicted effects in setting the margin of safety. But the margin of safety does not require EPA to set "zero" as the standard, or even allow her to set a "zero" standard unless there is a credible basis for the Administrator to conclude that such a standard is "requisite to protect the public health."

III. Who Wins, Who Loses?

The objective of the Act is to ensure there will be no victims of the diseases of air pollution. EPA estimates that its fine particle standards alone will prevent 15,000 deaths per year in the U.S. PMJA 3486-87. In 1990, Congress cited evidence that annually "50,000 premature deaths may be caused by air pollutants. . . . " S. Rep. No. 101-228 (1989), 3. The total death toll from air pollution in general, or fine particles in particular, is not, by any reliable estimate, an insignificant public health problem. Eliminating death by air pollution is possible, someday, only if the standards that animate the control programs

under the Act are set at levels that will prevent those deaths.

If that goal is compromised by standards that fail to require that level of protection, there will be many losers. Most obvious are the victims of the pollution itself – those thousands who suffer premature death, or the tens of thousands who require frequent hospitalization and medical attention, or the hundreds of thousands who need to bear the burden of the expense and physical side effects of increased medication, and the millions of Americans forced to stay home from school, or work or the sand lot baseball diamond on a summer afternoon. Among these victims are the individuals filing this brief who are virtually incapacitated on high pollution days.

These losses by the victims of pollution can be monetized for analysis purposes, but in human terms these are losses that cannot be fully compensated with money. Nor is there any mechanism routinely to compensate the victims for these losses. The reality is that if not prevented, most of those losses will never be compensated.

If the NAAQS are not based on the latest scientific evidence of harmful levels of air pollution, then there may be numerous other losers as well. First will be the States that have responsibility for issuing most new source permits under the Act. Federal law requires only that permit applicants demonstrate that their emissions will meet the NAAQS. *E.g., see* § 165(a). But many State air statutes and most State's common law prohibit emissions that injure, harm or endanger public health. If there is a substantial body of evidence that harm will occur at levels allowed by the NAAQS, then State agencies will

become the battleground for determining the necessary limits on emissions to protect public health. The result will be a return to the days of conflict over each new source permit on public health grounds. Permit applicants will have no assurance that they can get a permit by simply demonstrating compliance with the NAAQS, permitting agencies will have to develop expertise in various fields related to the science of health effects, and communities will have no assurance that their air will be safe to breathe if the NAAQS are met. This approach will also produce multiple conflicting determinations of the amount of pollution exposure that can be allowed and still protect the public health.

Such challenges are already being brought based on the evidence of harm from short-term SO2 exposures that convinced the D.C. Circuit to remand the SO2 NAAQS to EPA, *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), and the evidence that the fine particle NAAQS is not adequate to protect against most of the mortality and morbidity effects of high daily exposures that is the basis for CBT's challenge in this case. In Pittsburgh, citizens challenged a permit for a new coke plant proposed by LTV on the ground that SO2 and fine particle emissions meeting both NAAQS would cause significant harm to the public health, and in Arizona the City of Tempe raised similar issues in a demand that EPA quantify the residual risks of exposure to fine particles that would not be prevented by the 1997 NAAQS as part of the NEPA review of a new power plant. In Washington State, the parents of an asthmatic 10-year-old boy and a 7-year-old girl with cystic fibrosis are suing the State under the Americans With Disabilities Act for the failure to adopt

emissions controls to prevent life-threatening levels of fine particle pollution from wheat stubble burning that nonetheless meet EPA's 24-hour NAAQS for PM2.5. *Save Our Summers v. Washington State Department of Ecology*, No. CS-99-0269-RHW (E.D. Wa.). If EPA is allowed to set NAAQS that fail to protect against scientifically demonstrated adverse effects because of costs, or otherwise fail to meet the standard of the law, then these kinds of challenges to new and existing sources will likely become commonplace nationwide.

There is a significant benefit for all stakeholders, including the industry petitioners in this case, that flows from the confidence of the public that if the NAAQS are met their air will be safe, and the certainty for industry and the permitting agencies that flows from one national standard that ensures the public is protected from the known adverse effects of air pollution. These benefits are some of the objectives Congress had in mind when it replaced the process for setting many regional standards with one national standard that protects the public health with an adequate margin of safety.

CONCLUSION

The decision of the Court of Appeals in *Lead Industries Ass'n v. EPA*, and subsequent cases, holding that costs play no part in setting NAAQS, should be affirmed.

Respectfully submitted,

ROBERT E. YUHNKE

Counsel for Citizens for Balanced Transportation, Richard Romero (on behalf of himself and his minor son, Richard Romero, Jr.), David Matusow, Brian McCarthy, James Bassage and Michael Gregory